INDEX

CITATIONS

Cases:

Statutes:

Texts:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND
Petitioner

v.

UNIVERSAL FILM EXCHANGES, INC., LOEW'S INC., METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, VITAGRAPH, INC., RKO DISTRIBUTING CORPORATION, UNITED ARTISTS CORPORATION, COLUMBIA PICTURES CORPORATION
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (R. 2015-2035) is reported at 172 F. 2d 37. The opinions of the United States District Court for the District of Massachusetts (R. 91-125; 187-246) are reported at 43 F. Supp. 996 and 72 F. Supp. 469.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on December 21, 1948 (R. 2035). The petition for a writ of certiorari was filed on March 17, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254 (1).

QUESTIONS PRESENTED

1. The primary question presented by this petition for review of the disposition of this action, the fourth suit brought by the petitioner involving the same basic claims against the respondents herein as defendants or as co-conspirators, is whether Congress intended the doctrines of res judicata and collateral estoppel not to apply to litigation under the anti-trust laws.

2. Questions concerning the application of Statutes of Limitations in private anti-trust actions are also presented, but, for the reasons hereinafter set forth, these are of minor consequence.

3. The ultimate question of whether the evidence warranted the submission of the petitioner's case to the jury is, of course, presented, but, in view of the fact that this evidence was the same as that introduced in the prior litigation, the disposition of this issue would necessarily be governed by the resolution of the issues raised by the first question presented above.

STATEMENT

The petitioner's statement of the case is not accurate. The respondents present herewith a statement of the case which they believe to be accurate and necessary for a proper consideration of the petition.

The case at bar is the fourth anti-trust action brought

by this petitioner, as plaintiff, involving the same basic claims, in each of which the respondents herein were named as defendants or as co-conspirators. So far as any of these actions resulted in any judgment affecting the respondents, either as defendants or as co-conspirators, the judgment in each action has been in favor of the respondents.

The four actions are:

Oklahoma No. 4520. Begun by the petitioner in the District Court of the United States for the Western District of Oklahoma April 17, 1931 as assignee in his own right under assignments dated April 13, 1931 from theatre corporations operating in Oklahoma. In 1934 further assignments dated December 31, 1933 were alleged. This action was dismissed April 19, 1937 by the petitioner rather than to comply with an order directing the filing of an amended complaint (R. 99, 104).

Oklahoma No. 6516. Begun by the petitioner in the District Court of the United States for the Western District of Oklahoma April 1938 as assignee under the same two sets of assignments hereinbefore described. Tried 1942-1943 before United States District Judge Browder Broaddus without a jury. Terminated August 16, 1944 in judgment on the merits for all of the respondents herein. Judgment never appealed by the petitioner (Court's Exhibits 1, 3, 4, R. 388, 1258, 1261, 1389).

Oklahoma No. 6517. Begun by the petitioner in the same Oklahoma District Court April 1938 as assignee under the same two sets of assignments. This action was consolidated and tried with 6516, and terminated August 16, 1944 in judgment on the merits for a defendant privy to the respondent Vitagraph herein and in favor of all other defendants in Oklahoma excepting two, *not parties here*, in respect to whom a comparatively small recovery was paid for individual tortious acts, in respect to which the respondents herein were found to be innocent. This judg-

ment was likewise never appealed by the petitioner (Court's Exhibits 2, 3, 5, R. 388, 1259, 1261, 1431).

Massachusetts No. 7024. Begun by the petitioner in the District Court for the District of Massachusetts June 7, 1937 as assignee under the same two sets of assignments. Trial before Judge Wyzanski and a jury terminated February 13, 1947 in a judgment on the merits for all of the respondents after a verdict for the petitioner had been set aside by Judge Wyzanski (R. 186). It is this judgment, unanimously affirmed by the Court of Appeals (R. 2015), which the petitioner seeks to review here.

As appears from the above, the present litigation began April 17, 1931 with a suit brought on that day in the Oklahoma District Court (No. 4520) under the anti-trust laws by this petitioner, claiming for his own benefit under assignments* made April 13, 1931 (R. 83, 99) by some fifteen corporations in which the petitioner and his father were principal stockholders engaged in operating, managing or leasing motion picture theatres in twelve cities or towns in Oklahoma (R. 355-356) against a number of corporate defendants and asserting alleged wrongs commencing about 1927 under a conspiracy alleged to have been formed about 1922. By amendment filed August 27, 1934, petitioner introduced further assignments to the petitioner dated December 31, 1933 by these same corporations against all of the respondents herein except Loew's (R. 104, 117).

All of the respondents herein were defendants in that suit. Other defendants were also named. The basic causes of action alleged (called the "generic conspiracy") were, with minor exceptions, the same as those alleged in the instant case (R. 116).

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*Respondents urged below, and would maintain here, that these assignments were for causes of action in tort and hence invalid under Oklahoma law. *Kansas City M. & O. R. R.* v. *Shutt*, 24 Okla. 96, 104 Pac. 51, 53.

After certain interlocutory proceedings, the petitioner was ordered to make his complaint more definite and certain. This he declined to do and, accordingly, the District Court dismissed his complaint (R. 83). The Circuit Court of Appeals for the Tenth Circuit, by mandate entered in April 1937, affirmed the dismissal but "without prejudice" (R. 99, 104).

The petitioner thereupon split his litigation into three parts:

1. In June 1937 he instituted the present action in Massachusetts as assignee under the same two sets of assignments against the respondents — eight distributors of motion pictures who had been parties to the original Oklahoma 4520 suit brought in 1931 (R. 92). This action was based on a claim that the distributors had about 1922 entered into a "generic conspiracy" manifested by participation in the standard exhibition contract*, the maintenance of credit committees, and attempts to monopolize and restrain trade in some twenty different ways, and that this "generic conspiracy" and its manifestations had resulted in damage to ten of the assignor corporations (R. 12-66). This same "generic conspiracy" was the basis of all of the subsequent litigation.

2. In an action brought in Oklahoma in 1938, numbered 6516, the petitioner sued as assignee under the same two sets of assignments of seven of the corporations which had been named in Oklahoma 4520. The respondents herein, or their privies, were the named defendants in this action. While five of these assignor operating corporations were different from those described in the present action, two assignors were the same and the complaints were otherwise substantially identical in substance as those alleged

*The standard exhibition contract had resulted from a trade conference initiated and presided over by the Federal Trade Commission and had been approved by that Commission (see *United States* v. *Paramount Famous Lasky Corp.*, 34 F. 2d 984, 986).

in Massachusetts 7024. (Compare R. 12-66 with Court's Exhibit 4, R. 388, 1389-1431.)

3. On the same day petitioner brought Oklahoma action No. 6517 as assignee under the same two sets of assignments of all fifteen of the assignor corporations. The defendants named were, with the exception of Warner Brothers Pictures, Inc. (found to be privy to Vitagraph), different from the defendants named as such in Massachusetts 7024 or in Oklahoma 6516, although these defendants all were named as co-conspirators in both of these actions. Similarly, the defendants in Massachusetts 7024, respondents herein, all were named as co-conspirators in Oklahoma 6517. The "generic conspiracy" was the same, and expressed in substantially the same language, as was alleged in Oklahoma 6516 and in Massachusetts 7024. (Compare R. 12-66 with Court's Exhibits 4 and 5, R. 388, 1389-1431.)

The following table shows graphically the designations of the respondents and their privies in the three actions.*

DEFENDANTS IN MASSACHUSETTS 7024 AND WARNER BROTHERS PICTURES, INC. SHOWN IN RELATION TO THEIR POSITION AS DEFENDANTS OR AS ALLEGED CO-CONSPIRATORS IN SAID ACTION AND IN OKLAHOMA 6516 AND OKLAHOMA 6517.

(Abbreviated Names Used)

Corporation	*Massachusetts 7024*	*Oklahoma 6516*	*Oklahoma 6517*
Universal	Defendant	Defendant	Co-conspirator
Loew's	Defendant	Defendant	Co-conspirator
Metro	Defendant	Co-conspirator	Co-conspirator
Fox	Defendant	Defendant	Co-conspirator
RKO	Defendant	Defendant	Co-conspirator
United Artists	Defendant	Defendant	Co-conspirator
Columbia	Defendant	Defendant	Co-conspirator
Vitagraph	Defendant	Defendant	Co-conspirator
Warner Brothers	Co-conspirator	Co-conspirator	Defendant

*References: Court's Exhibit 3, R. 388, 1262-1264; Court's Exhibit 4, R. 388, 1389-1391; Court's Exhibit 5, R. 388, 1432. Metro was the film-distributing subsidiary of Loew's and Vitagraph was that of Warner Brothers.

Oklahoma 6516 and 6517 were consolidated and tried together by the same counsel before Judge Broaddus without a jury, in a protracted trial which began in December 1942 and ended in the middle of 1943. In that action the issues were drawn between the petitioner suing in his own interest, on the one side, and the respondents in the case at bar, on the other, named either as defendants or as co-conspirators with respect to the same "generic conspiracy" averred to have been operative in twelve municipalities in Oklahoma, which included all seven of the municipalities specified in the instant action.

Judge Broaddus by his findings and judgments determined, so far as presently pertinent, that the respondents had not conspired and that they were not guilty of any breach of the anti-trust laws, excepting two technical violations relating to the use of the standard exhibition contract and credit committee matters, and that, although these were violations of the anti-trust laws, they did not cause the petitioner's assignors any damage (Court's Exhibit 3, R. 388, 1331-1341, 1344-1379). "Paramount" and "Griffith," defendants in Oklahoma 6517 but not defendants in the case at bar, were found to have damaged certain of the petitioner's assignors in comparatively small sums by tortious conduct *not* a part of the "generic conspiracy," and Judge Broaddus, after some procedural doubts, permitted recovery in 6517 for these torts, even though not part of the "generic conspiracy" (*Id.* at 1382-1388). These judgments in relatively small amounts have long since been paid.

About two and half years later, the trial of the present action before District Judge Wyzanski and a jury began in January 1947. There had been previous consideration by Judge Wyzanski of the defense of the Statute of Limitations which had been asserted by the defendants, and, as a result of which, Judge Wyzanski had established certain periods within which the petitioner's proof was to be laid

(R. 91-125). In fact, the matter of the Statute of Limitations proved not to be of particular consequence, since Judge Wyzanski permitted the petitioner to go back to May 6, 1928 as to the matters left open to him by the Oklahoma judgments (R. 121-123). The petitioner, in his opening to the jury, asserted that no damage of any consequence had been suffered by him by reason of the respondents' acts until early in 1928 (R. 356, 368); and there is not the slightest reason to suppose that if any of the rulings relating to the Statute of Limitations complained about had been different the plaintiff's recovery before the jury would have been any greater.

Judge Wyzanski ruled that the petitioner was estopped by the Oklahoma judgments and proceedings to maintain in Massachusetts that the defendants had conspired in a manner in which the Oklahoma Court had held that they had not conspired (R. 190, 191, 305-327). Although at the trial before the jury Judge Wyzanski urged and encouraged the petitioner to offer evidence of conspiracy outside of the bar of the judgments in Oklahoma, the petitioner was unable to do so (R. 955-967). While Judge Wyzanski permitted the case to go to the jury as to certain of the respondents, upon careful and painstaking consideration of the matter after the jury's verdict he concluded that the petitioner had offered no evidence entitling him to the submission of the matter to the jury in respect to any issue as to which he was not already precluded by the prior trials in Oklahoma. It is for this reason that he set aside the verdict and ordered a judgment for the respondents. The detailed reasons of the judge are set forth in his considered opinion (R. 187*).

The Court of Appeals applied the well-settled rules of estoppel by judgment and held that within the area left open to the petitioner by the rulings as to the binding

*It is to be noted that the page references in this opinion are to the stenographic record, not to the printed record.

effect of the prior Oklahoma judgments, he had not offered evidence of matters entitling him to a determination by a jury; rulings of the District Court as to the binding effect of the earlier Oklahoma judgments in this respect and as to the application of the Statute of Limitations were correct; and, accordingly, the Court of Appeals for the First Circuit unanimously affirmed the action of the Massachusetts District Court (R. 2015).

ARGUMENT

1. Notwithstanding the assertion of the petitioner to the contrary, there is nothing in the decision of the Court of Appeals of the First Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. What the petitioner is complaining of are matters which he asserts would have been decided otherwise had the issues which were tried by the Oklahoma District Court been reviewed by an Appellate Court upon an appeal in that case. But this is not anything of which he can take advantage here. His remedy, if there was any error on these matters, which the respondents do not concede, consisted in an appeal which he chose not to take.

2. Assuming the applicability of the doctrines of collateral estoppel and res judicata to anti-trust litigation, there is no question whatsoever as to the correctness of the rulings below. The respondents and their privies were admittedly parties to the consolidated Oklahoma litigation both as defendants and as alleged co-conspirators. (See also Restatement, Judgments, sec. 83, and particularly comment (c) thereunder.) Similarly, there is no real dispute concerning the identity of the basic causes of action, claims, or occurrences in the Oklahoma cases with those asserted by the petitioner in the instant case. Indeed, the petitioner had to assert that all three proceedings — Oklahoma 6516 and 6517 and the case at bar — were the same "action" as Oklahoma 4520 in order to prevent the

Oklahoma Statute of Limitations from operating as a complete bar to recovery, as none of these proceedings were brought within three years from the date of the last assignment, December 31, 1933 (R. 114-116).

3. The petitioner seeks in substance a declaration by this Court that the important considerations of public policy that there be an end to litigation once fully and fairly tried should not be applied in anti-trust cases, and that plaintiff should have two chances to try his cause of action; and, if two, why not three or more? And if a plaintiff is to be given several trial opportunities, why not a defendant? In the nearly three generations since the anti-trust laws were first enacted no one has even remotely suggested such a proposition. The respondents submit that the proposition is as unsound as it is novel. This Court has had occasion to apply the well-recognized principles of estoppel to anti-trust litigation. See *e.g.*, *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, 459. Indeed, Congress recognized the applicability of the doctrine in Section 5 of the Clayton Act when it provided that a final judgment or decree in an anti-trust proceeding instituted by the Government should be prima facie evidence in any suit brought by any party *"as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."* 38 Stat. 731, 15 U. S. C. §16. (Italics supplied.)

4. The decision of the Court of Appeals does not deal with any novel or important question of law not previously decided by this Court. The case is unusual only in that the petitioner, by the use of shifts and splits attempted to double his chances for recovery. It was not novel for the Courts below to hold that the petitioner could not so avoid the well-settled principles of res judicata and collateral estoppel. Nor do the factual issues involved in this litigation raise any important questions of motion picture anti-trust law. The fact of the matter is that this more

than twenty-year-old controversy emanated from the petitioner's difficulties in converting from silent to sound motion pictures in the late '20s, a type of motion picture anti-trust litigation not likely to recur in the future. There is involved in these proceedings none of the problems which relate to the recent controversy between the United States and motion picture companies as to what is necessary to bring the conduct of those companies into harmony with the anti-trust laws. The practices which lie at the foundation of the plaintiff's claims were discontinued nearly twenty years ago. The use of the standard exhibition contract and of the credit committee plan were completely discontinued by the end of 1930 (Court's Exhibit 3, R. 388, 1287, 1291). Even if this were a representative action, which it is not, this should be sufficient reason for this Court to decline to grant the petition. For these reasons the respondents respectfully submit that the case is important only to the parties herein and is not an appropriate case for review on certiorari.

5. The decision of the Court of Appeals was right. The best argument for this proposition is the decision of the Court of Appeals itself and the elaborate and painstaking opinion of the District Judge incorporated by reference in that decision (R. 2015, 2020; 172 F. 2d 37; 72 F. Supp. 469).

6. The Statute of Limitations question was rightly decided for the reasons contained in the decision of the District Judge (R. 91-126). The Courts below properly applied the Massachusetts statute. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390. Petitioner concedes this but appears to quarrel with the State legislature for inserting a "borrowing" provision in the statute barring actions which would be barred in the jurisdiction where the cause of action arose (Pet. 22-23). Litigious plaintiffs in search of a forum will find such "borrowing" provisions to be quite common, and they are unquestion-

ably valid. Cf. *Cope* v. *Anderson*, 331 U. S. 461. Such provisions merely adopt, for reasons of public policy, the bar of the state of the plaintiff's residence as a measure of the bar imposed in fact by the law of the forum. *Knight* v. *Moline Ry.*, 160 Ia. 160. Were the wisdom of such legislation before this Court, respondents respectfully submit that any conclusion other than that a state may refuse to provide a haven for outlawed claims would be unthinkable. The petitioner's contention that he did not know of the conspiracy of which he complained and that, therefore, the statute should not be held to begin to run until he had such knowledge, is a strange argument indeed. Apart from the fact that the petitioner cites no authority for any such proposition, the fact is that on April 17, 1931*, the petitioner filed an elaborate declaration in Oklahoma 4520 containing substantially the same charges as those contained in the declaration filed in Massachusetts in 1937 and in the complaints filed in Oklahoma in 1938. Surely he knew at that time of the alleged conspiracy. In any event, as has been stated above, the Statute of Limitations was not an important matter by reason of the petitioner's concessions that no damage of any consequence was suffered by him until early in 1928. The decision of the District Judge permitted him to go back to May 1928 on the two matters left open to him by the decision in Oklahoma, upon which he sought to introduce proof.

7. The petitioner has had two full trials; he obtained, in the first of these, treble recovery for all the damage he was able to establish. Three courts have now held that, after full opportunity, he has failed to establish a case for recovery against these respondents. A reversal by this Court would result only in a new trial and continued litigation. This is so for many reasons, among which are (*a*) as

*A date which under the Oklahoma 3-year statute would have carried him back at the most to April 17, 1928.

to two of the respondents, Loew's and Vitagraph, verdicts in their favor were directed by the court and their cases were not considered by the jury (see, e.g., R. 1174) and (*b*) as to the remaining respondents, one of Judge Wyzanski's key rulings was, as stated in a dictum by the Court of Appeals, erroneously adverse (R. 2029; 172 F. 2d at 46-47). Public policy requires that this litigation, which has been in progress for eighteen years, be now at an end.

CONCLUSION

The decision below is correct, and there is no warrant for review of the questions presented by the petition. The petition should therefore be denied.

Respectfully submitted

JACOB J. KAPLAN

For Respondents

NUTTER, McCLENNEN & FISH

of Counsel

April, 1949.